

Hearing Date and Time: August 18, 2021 at 10:00 a.m. (ET)

<p>UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY</p> <p>Caption in Compliance with D.N.J. LBR 9004-1(b)</p> <p>Michael Kwiatkowski, Esq. CULLEN AND DYKMAN LLP 100 Quentin Roosevelt Boulevard Garden City, New York 11530 T: (516) 357-3700 F: (516) 357-3792 mkwiatkowski@cullenllp.com</p> <p>- and -</p> <p>Russell R. Johnson III, Esq. (<i>pro hac vice</i> admission pending) Law Firm of Russell R. Johnson III, PLC 2258 Wheatlands Drive Manakin-Sabot, VA 23103 T: 804-749-8861 F: 804-749-8862 russell@russelljohnsonlawfirm.com</p> <p><i>Co-Counsel for Public Service Electric and Gas Company</i></p>	
<p>In re:</p> <p>ALUMINUM SHAPES, L.L.C.,</p> <p>Debtor.</p>	<p>Chapter 11</p> <p>Case No. 21-16520 (JNP)</p> <p>Honorable Jerrold N. Poslusny Jr.</p>

**OBJECTION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY
TO THE DEBTOR’S MOTION PURSUANT TO 11 U.S.C. §§ 105
AND 366 PROHIBITING UTILITIES FROM ALTERING, REFUSING, OR
DISCONTINUING SERVICES ON ACCOUNT OF PREPETITION CLAIMS,
ESTABLISHING PROCEDURES FOR DETERMINING REQUESTS FOR
ADDITIONAL ADEQUATE ASSURANCE AND FOR RELATED RELIEF**

Public Service Electric and Gas Company (“PSE&G”), hereby objects to the *Debtor’s*
Motion Pursuant To 11 U.S.C. §§ 105 and 366 Prohibiting Utilities from Altering, Refusing, or

Discontinuing Services on Account of Prepetition Claims, Establishing Procedures for Determining Requests for Additional Adequate Assurance and for Related Relief (the “Utility Motion”) (Docket No. 9), and sets forth the following:

Introduction

Despite the fact that PSE&G is one of only four utilities listed on Exhibit “A” to the Utility Motion, the Debtor did not contact PSE&G regarding PSE&G’s request for adequate assurance of payment prior to filing the Utility Motion. Furthermore, the Debtor’s filing of the Utility Motion prior to attempting to contact PSE&G and the three other utility companies to attempt to resolve their adequate assurance of payment requests was an unnecessary waste of the limited financial resources of the Debtor’s estate.

The Debtor filed the Utility Motion seeking to establish its own form and amount of adequate assurance for PSE&G, which is not to provide PSE&G with any meaningful adequate assurance of payment. It is difficult to ascertain what specifically the Debtor is offering because the what is “offered” in paragraphs 14 and 26 of the Utility Motion are not the same. It appears from the Utility Motion and proposed Order that the Debtor is seeking authority to pay, but not be required to pay, prepetition amounts owing to the utilities as adequate assurance of payment. However, it is not clear if the Debtor is proposing to pay the entire prepetition debt as adequate assurance or just part. For example, the Debtor acknowledges in its Amended Voluntary Petition that it owes PSE&G \$1,805,850.14 and Energy Power Investment Co., LLC (“EPI”) \$390,720.42 for unpaid prepetition charges. PSE&G does not know what EPI’s post-petition deposit request will be, but PSE&G’s two-month request is only \$175,256. Hence, it would not make economic or common sense for the Debtor to pay PSE&G’s prepetition debt in lieu of PSE&G’s two-month deposit request.

In paragraph 26 of the Utility Motion, the Debtor asks that a two-week deposit be considered adequate assurance of payment. The foregoing offer is unreasonable for the following reasons: (1) the Debtor's average monthly bill for PSE&G is about \$88,000; (2) the Debtor's prepetition debt owed to PSE&G is over \$1,805,000; (3) the Debtor has not made a payment to PSE&G since January 2021; and (4) the Debtor has other top creditors that are utility providers. As a result, PSE&G's two-month deposit is reasonable in this case.

The Utility Motion also improperly seeks to shift the Debtor's obligations under Section 366(c)(3) from modifying the amount of adequate assurance of payment requested by PSE&G under Section 366(c)(2) to setting the form of the adequate assurance of payment acceptable to the Debtor. Under the applicable legal standard set forth in Section 366(c), it is the Debtor's burden to present evidence to demonstrate, why, if at all, the amount of PSE&G's adequate assurance of payment request should be modified. *See In re Stagecoach Enterprises, Inc., 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979)* (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). Courts that have found that the courts retain the same discretion as under Section 366(b), or allow the debtor to pick the form and/or amount of security, simply refuse to follow the plain language of the statute.

The Debtor, as a customer of PSE&G, is aware that: (1) PSE&G bills the Debtor on a monthly basis in arrears and provides the Debtor with generous trade terms; and (2) pursuant to state-law tariffs, is allowed to obtain a two-month cash deposit to cover its billing exposure. With the foregoing knowledge, the Debtor should be required, at a minimum, to set forth a factual and evidentiary basis as to why this Court should consider modifying the amount of adequate assurance of payment that PSE&G is entitled to request.

PSE&G is seeking a two-month cash deposit in the amount of \$175,256 from the Debtor

that PSE&G is authorized to obtain from its customers in its service territory pursuant to applicable state law. Based on all the foregoing, this Court should deny the Utility Motion as to PSE&G because the amount of PSE&G's post-petition deposit request is reasonable under the circumstances and should not be modified.

Facts

1. On August 15, the Debtor commenced its case under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") that is now pending with this Court. The Debtor continues to operate its business and manage its properties as a debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

The Utility Motion

2. Instead of attempting to contact PSE&G to obtain its deposit request and follow the requirements and procedures set forth in Section 366, the Debtor filed the Utility Motion on the Petition Date.

3. On August 16, 2021, the Court entered the *Order Regarding Debtor's Application For Expedited Consideration of First Day Motions* (Docket No. 24) that set a telephonic hearing on the Utility Motion to take place on August 18, 2021 at 10:00 a.m., with any objection and/or responses to the Utility Motion made at that hearing pursuant to D.N.J. LBR 9013-5(d).

4. The Debtor's proposed form of adequate assurance of payment, in the first instance, is to seek authority, but not be required to pay, the prepetition amounts owed to a utility. Utility Motion at ¶ 14. If a utility accepts the payment of prepetition debt, the utility shall be deemed to be adequately assured of future payment and shall waive any right to seek additional adequate assurance in the form of a deposit or otherwise. *Id.* As the Debtor owes

PSE&G approximately \$1,819,039.35 for unpaid prepetition utility goods/services and PSE&G's two-month deposit request is \$176,256, PSE&G does not believe the Debtor is truly seeking to pay PSE&G's prepetition debt as adequate assurance of payment pursuant to Section 366(c) of the Bankruptcy Code.

5. It appears from paragraph 26 of the Utility Motion that the Debtor is seeking a determination that a two-week deposit should be considered as adequate assurance of payment in this case. By the Debtor's own admission in paragraph 22 of the *Declaration Of Jordan Meyers In Support Of Debtor's Chapter 11 Petition And First Day Motions* [Docket No. 17] ("Meyers Declaration"), the Debtor has "a number of judgments entered against it from utility suppliers and vendors which in total exceed \$7,000,000." Moreover, for two of the four utilities listed in Exhibit A to the Utility Motion, the Debtor owes PSE&G \$1,805,850.14 and Energy Power Investment Co., LLC ("EPI") \$390,720.42 for unpaid prepetition charges. Based on the Debtor's extremely poor payment history with utility companies, it is inconceivable how a two-week deposit could constitute adequate assurance of payment.

6. Moreover, under Sections 366(c)(2) and (3), this Court and the Debtor are limited to modifying, if at all, the amount of the security sought by PSE&G under Section 366(c)(2). The Utility Motion, however, fails to address why this Court should consider modifying, if at all, the amount of PSE&G's adequate assurance request pursuant to Section 366(c)(2).

Facts Concerning PSE&G

7. PSE&G provided the Debtor with prepetition utility goods and/or services and has continued to provide the Debtor with utility goods and/or services since the Petition Date.

8. Under PSE&G's billing cycles, the Debtor receives approximately one month of utility goods and/or services before PSE&G issues a bill for such charges. Once a bill is issued,

the Debtor has 15 days to pay the applicable bill. If the Debtor fails to timely pay the bill after the 45th day of the invoice date, a past due notice is issued and, in most instances, a late fee may be subsequently imposed. If the Debtor fail to pay the bill after the issuance of the past due notice, PSE&G issues a notice that informs the Debtor that it must cure the arrearage within a certain period of time or service will be disconnected. Accordingly, under PSE&G's billing cycle, the Debtor could receive approximately two months of unpaid charges before the utility could cease the supply of goods and/or services for a post-petition payment default.

9. In order to avoid the need to bring witnesses and have lengthy testimony regarding PSE&G's regulated billing cycle, PSE&G requests that this Court, pursuant to Rule 201 of the Federal Rules of Evidence, take judicial notice of PSE&G's billing cycles. Pursuant to the foregoing request and based on the voluminous size of the applicable documents, PSE&G's web site links to the tariffs and/or state laws, regulations and/or ordinances are as follows:

PSE&G:

Electric: <https://nj.pseg.com/aboutpseg/regulatorypage/electrictariffs>

Gas: <https://nj.pseg.com/aboutpseg/regulatorypage/gastariffs>

10. Subject to a reservation of PSE&G's right to supplement its post-petition deposit request if additional accounts belonging to the Debtor are subsequently identified, PSE&G's estimated prepetition debt and post-petition deposit request is as follows:

<u>Utility</u>	<u>No. of Accounts</u>	<u>Estimated Prepet. Debt</u>	<u>Deposit Request</u>
PSE&G	3	\$1,819,039.35	\$175,256 (2-month)

11. The Debtor's last payments to PSE&G were received on January 25, 2021.

Discussion

A. THE UTILITY MOTION SHOULD BE DENIED AS TO PSE&G

Sections 366(b) of the Bankruptcy Code provides:

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

As set forth by the United States Supreme Court, “[i]t is well-established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 120 S. Ct., 1942, 147 L. Ed. 2d 1 (2000)). *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595, 597 (6th Cir. 1997) (“Statutes . . . must be read in a ‘straightforward’ and ‘commonsense’ manner.”). If a debtor believes the **amount** of the utility’s request needs to be modified, then the trustee or debtor can file a motion under Section 366(b) requesting the court to modify the **amount** of the utility’s request under Section 366(b).

In this case, the Debtor filed the Utility Motion to improperly shift the focus of the Debtor’s obligations under Section 366(b) from modifying the amount of the adequate assurance of payment requested under Section 366(b) to setting the form and amount of the adequate assurance of payment acceptable to the Debtor. Accordingly, this Court should not reward the Debtor for its failure to comply with the requirements of Section 366(b) and deny the Utility Motion as to PSE&G.

Moreover, in the Utility Motion, the Debtor fails to address why this Court should modify

the amount of PSE&G's request for adequate assurance of payment. Under Section 366(c)(3), the Debtor has the burden of proof as to whether the amount of PSE&G's adequate assurance of payment request should be modified. *See In re Stagecoach Enterprises, Inc.*, 1 B.R. 732, 734 (Bankr. M.D. Fla. 1979) (holding that the debtor, as the petitioning party at a Section 366 hearing, bears the burden of proof). However, the Debtor did not provide the Court with any evidence or factually supported documentation to explain why the amount of PSE&G's adequate assurance request should be modified. Accordingly, the Court should deny the relief requested by Debtor in the Utility Motion and require the Debtor to comply with the requirements of Section 366(c) with respect to PSE&G.

B. THE COURT SHOULD ORDER THE DEBTOR TO PROVIDE THE ADEQUATE ASSURANCE OF PAYMENT REQUESTED BY PSE&G PURSUANT TO SECTION 366 OF THE BANKRUPTCY CODE.

Section 366 of the Bankruptcy Code was enacted to balance a debtor's need for utility services from a provider that holds a monopoly on such services, with the need of the utility to ensure for itself and its rate payers that it receives payment for providing these essential services. *See In re Hanratty*, 907 F.2d 1418, 1424 (3d Cir. 1990). The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor." *In re Coastal Dry Dock & Repair Corp.*, 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986). In making such a determination, it is appropriate for the Court to consider "the length of time necessary for the utility to effect termination once one billing cycle is missed." *In re Begley*, 760 F.2d 46, 49 (3d Cir. 1985).

PSE&G bills the Debtor on a monthly basis for the charges already incurred by the Debtor in the prior month. PSE&G then provides the Debtor with approximately 15 days to pay a bill before a late fee may be charged, and also provide written notice before utility service can

be terminated for non-payment pursuant to applicable state laws and/or tariffs. Based on the foregoing state-mandated billing cycle, the minimum period of time the Debtor could receive service from PSE&G before termination of service for non-payment of post-petition bills is approximately two (2) months. Moreover, even if the Debtor timely pays its post-petition utility bills, PSE&G still has potential exposure of approximately 45 to 60 days based on its billing cycle. Furthermore, the amount of PSE&G's deposit request is the amount that the applicable public service commission, which is a neutral third-party entity, permits PSE&G to request from its customers. PSE&G is not taking the position that the deposit that it is entitled to obtain under applicable state law is binding on this Court, but, instead is introducing that amount as evidence of amount that its regulatory entity permits PSE&G to request from its customers.

Additionally, the Debtor failed to address in the Utility Motion why this Court should modify, if at all, the amount of PSE&G's adequate assurance of payment request, which is the Debtor's statutory burden. Instead, the Debtor merely asks this Court to approve its form of adequate assurance. The Debtor did not provide an objective, much less an evidentiary, basis for its proposed adequate assurance. Therefore, despite the fact that PSE&G continues to provide the Debtor with crucial post-petition utility services on the same generous terms that were provided prepetition, with the possibility of non-payment, the Debtor has seeks to deprive PSE&G of any adequate assurance of payment to which it is entitled for continuing to provide the Debtor with post-petition utility goods/services. Against this factual background, it is reasonable for PSE&Gs to seek and be awarded the full security it has have requested herein.

WHEREFORE, PSE&G respectfully requests that this Court enter an order:

1. Denying the Utility Motion as to PSE&G;
2. Awarding PSE&G the post-petition adequate assurance of payment pursuant to Section 366 in the amount and form satisfactory to PSE&G, which is the form and amount requested herein; and
3. Providing such other and further relief as the Court deems just and appropriate.

Dated: Garden City, New York
August 17, 2021

Respectfully Submitted,

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